Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

EDWARD J. FOLEY, SR.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a Federal Court of Appeals reviews an ERISA § 502(a)(1)(B) denial of benefits claim under an arbitrary and capricious standard of review may it reverse the District Court's conclusion that the Trustees acted in an arbitrary and capricious manner when they denied benefits by offering a rationale specifically rejected by the Trustees and which was not otherwise a basis for denial or litigated in the lower court?

PARTIES TO THE PROCEEDINGS

Petitioner

Edward J. Foley, Sr.

Respondent

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Other Parties

The International Brotherhood of Electrical Workers Local 98; Trustees John J. Dougherty, Edward Neilson Joseph Agresti, Thomas J, Reilly, Jr., Dennis Link, William Rhodes, Roy Dantz and Larry Bradley and Union Officers John J. Dougherty, Edward Neilson and Fred Compton were parties to the proceedings below and have no interest in the outcome of the petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	2
Statement of the Case	2
The Proceedings Below	3
Reasons for Granting the Writ	6
The Panel Decision sets up a needless conflict with all other Circuits who have been presented with this issue.	6
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) 10

Denton v. First Natl. Bank, 765 F.2d 1295 (5th Cir. 1985) 9, 10

Dishman v. UNUM Life Ins. Co. of America, 250 F.3d 1272 (9th Cir. 2001) 8

Doe v. Group Hospitalization, 3 F.3d 80 (4th Cir. 1993) 7

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6

Marolt v. Alliant Techsystems, Inc. 146 F.3d 617 (8th Cir. 1998) 8

Matuszak v. Torrington Co., 967 F.2d 320 (7th Cir. 1991) 9

Richardson v. Central States Pension Fund, 645 F.2d 660 (8th Cir. 1981) 10

Sandoval v. Aetna Life, 967 F.2d 377 (10th Cir. 1992) 8

Schadler v. Anthem Life Insurance, 147 F.3d 388 (5th Cir. 1998) 9

Cited Authorities

	Page
Sheldon v. Barre Belt Granite, 25 F.3d 74 (2d Cir. 1994)	7
Short v. Central States Pension Fund, 729 F.2d 567 (8th Cir. 1984)	10
Skretvedt v. E.I. Dupont, 268 F.3d 167 (3d Cir. 2001)	7, 8, 9
University Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000)	6, 7, 8
Statutes:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 1132(a)(1)(B)	i, 2, 6, 7, 10
29 U.S.C. § 1132(g)	4
Other Authority:	
IBEW Local 98 Pension Plan, Article 1, § C(1)(c)(i)	2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed November 8, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated And Filed March 29, 2000 ..... 20a

Appendix C — Memorandum Of The United States District Court For The Eastern District Of Pennsylvania Dated And Filed December 7, 2000 ..... 60a

Appendix D — Opinion And Judgment Of The United States District Court For The Eastern District Of Pennsylvania Dated August 25, 2000 And Filed August 28, 2000 ..... 74a

Appendix E — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated December 20, 2001 ..... 91a

Edward J. Foley, Sr., respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 263 F.3d 339 (3d Cir. 2001), and is reproduced in App. A at 1a-19a. The opinion and Order of the United States District Court for the Eastern District of Pennsylvania denying in part and granting in part cross motions for summary judgment is reported at 91 F. Supp. 2d 797 (E.D. Pa. 2000) and is reproduced in App. B at 20a-59a. The opinion and Order of the United States District Court for the Eastern District of Pennsylvania awarding the petitioner attorneys' fees is unreported and is reproduced in App. C at 60a-73a. The findings of fact, conclusions of law and verdict of the United States District Court for the Eastern District of Pennsylvania is reported at 112 F. Supp. 2d 411 (E.D. Pa. 2000) and is reproduced in Appendix D at 74a-90a. The decision of the Third Circuit Court of Appeals denying the petition for rehearing is unreported and is reproduced in App. E at 91a-93a.

STATEMENT OF JURISDICTION

The opinion of the Third Circuit Court of Appeals was issued on November 8, 2001. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on December 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Employee Retirement Income Security Act of 1974 § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) provides, among other things, that "A civil action may be brought by a participant or beneficiary . . . to recover benefits due him under the terms of his plan . . ."

STATEMENT OF THE CASE

The petitioner, Edward J. Foley, Sr., ("Foley") a participant and former trustee in the IBEW Local 98 Pension Plan, ("Plan") suffered a break in service in 1973 and forfeited 12 and half years of credited service. (App. D, at pp. 75a-76a) In 1988 Foley was granted an exception to this break in service pursuant to Article 1, § C(1)(c)(i) of the Plan when the Trustees determined that he was continuously available for work but unable to locate work during the period of his break in service. (App. D at pp. 76a-77a)

Approximately six years later Fred Compton ("Compton"), a former political rival, mailed a letter to Plan alleging that Foley "may have . . . misled or misinformed the Trustees" with respect to the restoration of his pension credits. The Plan reviewed this matter for a second time and found that the accusations were baseless and groundless (App. D pp. 77a, 81a-82a, note 2). Plan Counsel, Laurance Baccini prepared notes of this second review and acknowledged to Foley "there is *no* finding of wrongdoing, deceit, or misbehavior, or cover up" (App. D, pp. 81a-82a, note 2)

The "Confidential Report" was provided to Foley as the basis for the removal of the pension credits. In the report

Foley was compared to the 21 other individuals who had ever applied for the exception to the break in service rule and the Trustees found Foley to be similarly situated to these 21 individuals. (App. D, at pp. 78a, 81a, App B, at pg. 37a, note 12) Even though Foley was found to be similarly situated to the other participants and that the evidence he had presented to the Trustees was no different quantitatively or qualitatively from the others the Trustees removed the credits.

Foley appealed this decision several times and on each occasion his appeal was denied due to insufficient evidence. Foley was thus compelled to file the instant lawsuit.

THE PROCEEDINGS BELOW

The Plan changed its rationale for denial on a number of occasions during the course of this litigation. Initially, Plan Counsel argued that the Trustees were entitled to treat Foley differently than all other plan participants merely because unsubstantiated allegations were raised against him. (App. B, at pg. 38a, note 14) The District Court labeled this argument specious (App. B, at pg. 38a, note 14) This argument was abandoned and Plan Counsel next argued that the Trustees were entitled to treat Foley differently than the other Plan participants because he was a former Trustee and past President of Local 98.

At trial the Trustees rejected any and all rationale's holding Foley out to be different than any other Plan participant. Rejecting each of the previous arguments for disparate treatment the Trustees testified in District Court that they did not apply a stricter standard of proof to Foley's claim for benefits and thus did not treat him differently from the other plan participants. (App. D, pg. 82a) Their rationale

for reinstating the break in service was simply that he did not submit sufficient evidence.

During closing argument after two days of trial Plan counsel ignored the testimony of the Trustees and the documentary evidence that Foley was the same as all other participants and instead argued that the Trustees could treat Foley differently because he did not sign the out of work book. (App. D, pp. 81a-82a, note 2) The District Court rejected plan counsels arguments that ran contrary to the Trustees testimony and documents introduced into evidence and instead accepted the Trustees testimony that they believed in good faith that they treated Foley the same as all other plan participants. (App. D, at pg. 82a) Because the Trustees held Foley to a higher evidentiary standard than any other Plan participant who had sought refuge under the exception to the break in service rule the District Court found that the Trustees arbitrarily and capriciously denied Foley pension benefits and ordered the pension credits reinstated. (App. D, at pp. 80a, 85a, 87a, 88a). The District Court thereafter ordered that the attorneys' fees incurred by Foley in the prosecution of this claim be reimbursed pursuant to § 502(g) of ERISA (App. C)

On appeal the Defendants next argued that they could treat Foley differently than all other Plan participants because questions of impropriety were raised and he was a former Trustee. A panel of the Third Circuit Court of Appeals adopted this new rationale and found that it was not arbitrary and capricious to not treat Foley the same as the other Plan participants. (App. A, pg. 9a) The stated rationale of the Panel was that Foley was not similarly situated to the other participants; a rationale specifically rejected by the Trustees. The Panel stated that Foley was not similar because "he was

a Trustee", "issues of impropriety were raised" and his "entitlement to benefits under the exception was challenged." (App. A, pp. 9a-13a) Thus the Panel agreed with the District Court that Foley was treated differently than all other Participants. They however reached a different conclusion than the District Court by holding that permissible disparate treatment is appropriate merely upon the specter of raising allegations, a rationale specifically rejected by the board of Trustees.

Beyond the post hoc rationalization put forth by the Defendants and adopted by the Panel, the Third Circuit also engaged in its own post hoc rationalization to permit disparate treatment. The Panel offers a myriad of reasons why Foley should not be compared to the 20 other individuals who have ever sought refuge under the exception to the break in service rule and in doing so completely ignores the Trustees position that Foley was treated the same as all other individual participants. (App. A at pg. 16a) This judicially created rationale completely ignores the fact that it was the Trustees who conducted the research and located the 20 individuals who applied for the exception in the last 20 years and then compares his claim to the claims of these 20 participants. And it was the Trustees who concluded in the confidential report that Foley was no different than the other individuals who received the benefit. Foley was the same as these 20 other participants precisely because the Trustees believed he was the same. The Panel turns the Trustees comparisons and conclusions on their heads to support its own separate and distinct theory of permissible disparate treatment. (App A at pg. 16a)

Foley petitioned for rehearing en banc requesting the Court to avoid the needless conflict with all other Circuit

Courts of Appeals. A majority of the Circuit Judges did not vote for a hearing en banc thus requiring the filing of this writ in an effort to address this needless conflict. (App. E)

REASONS FOR GRANTING THE WRIT

The Panel Decision sets up a needless conflict with all other Circuits who have been presented with this issue.

Fourteen years ago this Court established the standard of review governing all § 502(a)(1)(B) claims for benefits in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). This Court declared that the decisions of Trustees are to be reviewed de novo unless the Plan reserves discretionary authority. As a result of *Firestone* Plans now, as a matter of course, routinely reserve discretion. The lower courts were then faced with the issue of what evidence should be permitted under this limited standard of review.

This Court has not been compelled to address the issue because the Circuit Courts of Appeal have not struggled to any great degree with this question. Each and every Circuit Court of Appeals who has been presented with the issue of whether or not to permit post-hoc rationalization of benefit denials has concluded that this is impermissible under the arbitrary and capricious standard of review. Simply put the courts have rejected any theory presented by the plaintiff or any defense which have been crafted after litigation has begun, attorneys have been consulted and deficiencies in the decision have been identified. *See University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839 (6th Cir. 2000) The Third Circuit Court of Appeals in Foley however has created a needless conflict with all other circuit courts of appeal by permitting the Defendants to develop novel

theories of denial which routinely changed throughout the course of the litigation in the lower courts. Incredibly the Court permits post hoc rationalization even though four days prior to oral argument in this case it stated in dicta that it would adopt the rational of all the other circuits on this issue. *See Skretvedt v. E.I. Dupont*, 268 F.3d 167 (3d Cir. 2001) Thus by ascribing a rationale for permissible disparate treatment that was not communicated to Foley and was specifically and unequivocally rejected by the Trustees, the Panel's decision sets up a needless conflict with all the other Circuit Courts who have considered this question

Each and every circuit court of appeals who has been presented with the question of what rationales the court may consider in a § 502(a)(1)(B) ERISA claim for benefits under the arbitrary and capricious standard of review has concluded that a reviewing court cannot offer a rationale for denial that was not communicated to the participant. The Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal are equal in their unanimity that a reviewing court can not explore a rationale for denial that the Trustees themselves did not utilize or communicate to a participant. The Fifth and Seventh Circuit Courts of Appeals offer a modified response to a Plan's attempts to offer new rationale by permitting review of the new arguments but only after forfeiting the arbitrary and capricious standard of review.

In *Sheldon v. Barre Belt Granite*, 25 F.3d 74 (2d Cir. 1994) the Second Circuit held that a district court cannot affirm a denial of benefits by ascribing to the plan a reason for denial other than the one proffered to the claimant. In *Doe v. Group Hospitalization*, 3 F.3d 80 (4th Cir. 1993) the Fourth Circuit would not permit the plan to ascribe reasons for denial not communicated to the participant. In *University*

Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000) the Sixth Circuit refused to permit post hoc rationalization of a decision to deny benefits. In *Marolt v. Alliant Techsystems*, Inc. 146 F.3d 617 (8th Cir. 1998) the Eighth Circuit rejected plan counsel's argument of a reasonable interpretation of the plan because the plan committee did not rely on it when denying benefits. In *Dishman v. UNUM Life Ins. Co. of America*, 250 F.3d 1272 (9th Cir. 2001) the Ninth Circuit held the fact that UNUM may be able post hoc to offer a legally plausible justification for its termination of benefits is irrelevant. In *Sandoval v. Aetna Life*, 967 F.2d 377 (10th Cir. 1992) the Tenth Circuit found that a curtain falls once administrative review is complete and thus post hoc justification is inappropriate.

On October 5, 2001, four days before oral argument in Foley, the Third Circuit Court of Appeals stated that it would follow the lead of the other circuit courts of appeal on this issue. In *Skretvedt v. E.I. Dupont*, 268 F.3d 167 (3d Cir. 2001) the Court reversed a grant of summary judgment for the plan because the decision to deny benefits was arbitrary and capricious and thus did not have to reach the issue of post hoc rationalization. The Court indicated in Note 8 however that if in the future it were presented with this issue it would stand by the precedent established in the other Circuit Courts of appeal. The Court specifically agreed with the policy considerations of the Sixth Circuit in *Emerson Electric* because:

> To depart from the administrative record in this fashion would, in our view, invite more terse and conclusory decisions from plan administrators, leaving room for them — or, worse yet, federal

> judges — to brainstorm and invent various proposed "rational bases" when their decisions are challenged in ensuing litigation. id. *Skretvedt* at n. 8 quoting *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839, 848 n. 7 (6th Cir. 2000)

Skretvedt, was not discussed nor even mentioned in the Panel decision.[1] Although the Third Circuit has indicated very strongly that it will not permit such post hoc rationalization it has simultaneously and contemporaneously permitted it in the instant case.

The rationale behind the refusal to consider reasons for denial not communicated to the plan participant is rooted in the judicially created doctrine of exhaustion of plan remedies. The Panel's decision in this case fundamentally upsets this well accepted doctrine. Although ERISA has no statutory requirement that a claimant must exhaust administrative remedies this requirement has been uniformly enforced. The Courts have imposed the exhaustion of remedies requirement to (1) uphold Congress's desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action is made under the arbitrary and capricious standard, not de novo. See, for example, *Denton*

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1. The Fifth Circuit and Seventh Circuit Court of Appeals also find post hoc rationalization to be problematic. *See Schadler v. Anthem Life Insurance*, 147 F.3d 388, 398 (5th Cir. 1998) and *Matuszak v. Torrington Co.*, 967 F.2d 320, 322-323 (7th Cir. 1991) These Circuits however offer the remedy of either remanding to the Trustees for further consideration or permitting the District Court to review the new rationale under de novo review.

v. First Natl. Bank, 765 F.2d 1295, 1300 (5th Cir. 1985) or *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980) Thus a delicate balance has been crafted by the courts over the last twenty plus years that ensures a very limited role for the federal courts in ERISA § 502(a)(1)(B) claims provided that the parties avail themselves of the administrative review process and the Trustees fully communicate their decisions to the participants.

The dual principles of exhaustion of plan remedies and the universal refusal to consider post hoc rationalization are therefore not mutually exclusive and are rather entirely dependent on one another. The goal behind ERISA's claims procedures was to create incentive to develop a "body of precedent" to ensure consistency in plan administration. *See Richardson v. Central States Pension Fund*, 645 F.2d 660 (8th Cir. 1981) It is axiomatic then that post hoc rationale could only mean that plan trustees have not developed this body of precedent a prevents a participant from demonstrating conformity with the criteria being utilized by the administrator. Ultimately a post hoc attempt to furnish a rationale for a denial . . . to avoid reversal on appeal, and thus meaningful review, diminishes the integrity of the Fund and its administrators. *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984)

The Panel's decision in the Third Circuit in this case upsets this balance and if allowed to stand would not only set up a needless conflict with all other circuits but would also more fundamentally eviscerate the administrative review process. If the decision reached and the means by which the Trustees arrived at that decision was not binding on the Plan when it came time for judicial review a participant would have no incentive to fully and fairly communicate with the

Trustees and in fact would lead to gamesmanship by potentially withholding the most important evidence until it was time for court. The courts too would likely become even further burdened through the unnecessary and burdensome process of reviewing any and all novel theories of denial that a creative attorney can craft for trial. Reviewing all of these new theories also would of necessity preclude issuing decisions on summary judgment thus requiring the additional and greater burden of a full trial.

Finally it must be pointed out that permissible disparate treatment by mere dint of the fact that Foley formerly served as a Trustee, without more, sets an extremely dangerous precedent that will effect in excess of 102,000 current trustees sitting on jointly administered trust funds and thus presents an important question for this Court. According to the Department of Labor there are approximately 17,000 jointly administered pension plans in the United States which are typically comprised of three employee trustees and three management trustees. Individual participants serve as trustees on these funds on a voluntary basis and without compensation which makes filling the ranks difficult at best. If this decision of the Third Circuit is to stand the task of filling these positions will become even more difficult because a reasonable person would never want to jeopardize his or her pension because they merely served as a trustee.

CONCLUSION

Edward J. Foley, Sr., respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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